

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA**

**STATE OF OKLAHOMA, ex rel. W.A.
DREW EDMONDSON, *et al.***

PLAINTIFFS

v.

CASE NO.: 4:05-CV-329-TCK-SAJ

TYSON FOODS, INC., *et al.*

DEFENDANTS

**DEFENDANTS' JOINT RESPONSE IN OPPOSITION TO PLAINTIFF'S MOTION FOR
ENTRY OF PROPOSED CONFIDENTIALITY ORDER**

COME NOW Defendants Tyson Foods, Inc., Tyson Poultry, Inc., Tyson Chicken, Inc., Cobb-Vantress, Inc., Cal-Maine Foods, Inc., Cal-Maine Farms, Inc., Cargill, Inc., Cargill Turkey Production, LLC, George's, Inc., George's Farms, Inc., Peterson Farms, Inc., Simmons Foods, Inc., and Willow Brook Foods, Inc. (collectively "the Poultry Defendants"), and by and through their attorneys, and submit the following as their Response to Plaintiff's Motion for Entry of Proposed Confidentiality Order (Dkt. No. 573).

I. Introduction

In its Motion for Entry of Proposed Confidentiality Order ("Motion"), Plaintiff has asked the Court to enter an order to limit the use and disclosure of confidential documents which may be produced by parties during discovery in this case. The Poultry Defendants agree that the entry of an appropriate confidentiality order is necessary in this case. However, the Poultry Defendants object to the form of Plaintiff's proposed confidentiality order attached as Exhibit A to its Motion ("Plaintiff's Proposed Order"). The Poultry Defendants ask this Court to instead enter a confidentiality order in the form of Exhibit 1 attached hereto.¹

¹ For the Court's convenience a black-lined version of the protective order proposed by the Poultry Defendants highlighting the differences between this order and Plaintiff's Proposed Order is attached hereto as Exhibit 2.

II. Plaintiff's Proposed Order Fails to Protect Proprietary and Confidential Business Information

This case involves numerous law firms representing over two hundred different parties including individuals, small business owners, corporations, municipalities and at least two public officials for the State of Oklahoma. Given the number of parties involved in this case and the nature of the allegations it is not difficult to imagine that the prosecution or defense of this case may require the use of information or documents which a disclosing party appropriately views as proprietary, trade secrets or highly confidential business or personal information. The dissemination of such information or documents beyond the fairly large group of attorneys or experts who may have a legitimate need to consult such information or documents as part of their role in this case could cause material harm to the disclosing party. Because of these realities, the Poultry Defendants have proposed a two-tiered protective order that would allow a party to designate highly confidential documents or other items as suitable for viewing only by counsel for the parties.

One example of why a two-tiered confidentiality order with additional protections for particularly sensitive information or documents is necessary in this case is presented by the fact that the Poultry Defendants are competitors in the same business – raising poultry and producing poultry products for human consumption. As a result, there is understandable concern about the potential for highly sensitive documents which may contain trade secrets or competitive information produced by one of the Poultry Defendants being disseminated among or discussed with non-legal representatives of another Poultry Defendants.

Plaintiff's Proposed Order makes no distinction between ordinary confidential information and highly sensitive confidential information. Under Plaintiff's Proposed Order, both types of information could be shared with non-legal representatives of other parties to this

action. To rectify this problem, the Poultry Defendants proposed to Plaintiff and now propose to this Court a two-tiered confidentiality order pursuant to which all parties could designate items as either “Confidential” or “Confidential – Attorney’s Eyes Only.” A two-tiered confidentiality order would allow a party to designate highly confidential documents or other items, which if disclosed to a competitor might cause material injury to the disclosing party, as suitable for viewing only by counsel for the parties.

The Poultry Defendants proposed a two-tiered confidentiality order to Plaintiff’s prior to the filing of Plaintiff’s motion. That proposal was summarily rejected by Plaintiff without any explanation. The Poultry Defendants ask that any confidentiality order entered by this Court incorporate a two-tiered approach to confidentiality with the parties having the ability to designate highly sensitive information or documents as “Attorney’s Eyes Only” information.

III. Plaintiff’s Proposed “Certification” Provisions are Unnecessary and Unduly Burdensome

The Poultry Defendants also object to the “attorney certification” provisions of Plaintiff’s Proposed Order. *See* Pls. Proposed Order ¶3 and Attachment A, Under the Plaintiff’s Proposed Order, an attorney must complete an affidavit for every document which it seeks to designate as “confidential” and provide that affidavit to other parties in this action. *See* Pls. Proposed Order ¶3. The Poultry Defendants would not object to a provision requiring that documents or other items may be designated as “Confidential” or “Confidential – Attorney’s Eyes Only” only after the attorney has reviewed the documents or items and has in good faith determined that the documents or items contain information or material which properly should be considered confidential in nature. The Poultry Defendants do object, however, to Plaintiff’s bureaucratic and unnecessary paperwork requirements.

The Poultry Defendants are unaware of any instance in which this Court or other federal courts in this district have imposed such an attorney certification provisions upon litigants.² There is no history of “over-designation” or abusive discovery tactics in this case to warrant such extraordinary and time consuming requirements. Counsel of record in this action are mature, reputable professionals with no known history of abusing their ability to designate documents or other items for confidential treatment. Plaintiff’s request for the completion, execution and submission of affidavits by counsel every time a confidential document is produced will simply create unnecessary red tape in a case that is already overwhelmed by paperwork. This requirement is simply unduly burdensome. The benefits provided by such a certification are far outweighed by the burden imposed upon the parties in dealing with superfluous paperwork.

The Poultry Defendants communicated to Plaintiff their objection to the attorney affidavit requirements of Plaintiff’s Proposed Order and asked that Plaintiff delete those provisions from the order in an effort to arrive at an agreed confidentiality order. Once again, Plaintiff summarily rejected that proposal without any explanation. The Poultry Defendants ask that any confidentiality order entered by this Court not incorporate the unnecessary and unduly burdensome attorney affidavit requirements proposed by Plaintiff.

² Plaintiff cites to the model protective order used by the United States District Court for the District of South Carolina as the singular example of a court which recommends similar attorney certification provisions. Motion, p. 2 (referring the Court to a model order found at www.scd.uscourts.gov/DOCS/confidential/confidentialityorder.pdf.) The U.S. District Court for the Northern District of Oklahoma apparently has not adopted a model protective order. However, there are many federal courts in other districts which have adopted model protective orders which do not require attorneys to certify confidential designations through attorney affidavits. *See, e.g.,* www.nysd.uscourts.gov/IndividualPractices/Rakoff/rjs_model_prot_ord.pdf (S.D. N.Y.), [www.cand.uscourts.gov/cand/form.nsf/7813fd3053452aef88256d4a0058fb31/5e428ee77bf8e03b88256dd3005d9450/\\$FILE/StipulatedProtectiveOrder-1-03.pdf](http://www.cand.uscourts.gov/cand/form.nsf/7813fd3053452aef88256d4a0058fb31/5e428ee77bf8e03b88256dd3005d9450/$FILE/StipulatedProtectiveOrder-1-03.pdf) (N.D. Cal.) (also including a two-tiered approach to confidentiality with an “Attorney’s Eyes Only” category).

IV. CONCLUSION

For the foregoing reasons, the Poultry Defendants request that this Court deny Plaintiff's Motion for Entry of Proposed Confidentiality Order. The Poultry Defendants request that this Court enter a Confidentiality Order incorporating a two-tiered system of confidential designation and eliminating the requirement that all confidentiality designations be formally certified by affidavits of counsel. Accordingly, the Poultry Defendants request that this Court enter a Protective Order in this case in a form substantially similar to the order attached hereto as Exhibit 2.

Respectfully submitted:

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CERTIFICATE OF SERVICE

I hereby certify that on this 22nd day of May, 2006, I electronically transmitted the foregoing document to the Clerk of the Court using the ECF System for filing and transmittal of a Notice of Electronic Filing to the following ECF registrants.

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Adam Scott Weintraub	Terry W. West	Dale Kenyon Williams, Jr.
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and I further certify that a true and correct copy of the above and foregoing will be mailed via first class U.S. Mail, postage properly paid, on the following who are not registered participants of the ECF System:

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